IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

NO. 76-314

CARL ANTHONY WUCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL CARUSO
425SOUTH BEVERLY DRIVE
BEVERLY HILLS, CALIFORNIA 90212
COUNSEL FOR PETITIONER

(213) 553-8580 - 879-9565

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

NO. ____

CARL ANTHONY WUCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL CARUSO
425SOUTH BEVERLY DRIVE
BEVERLY HILLS, CALIFORNIA 90212
COUNSEL FOR PETITIONER

(213) 553-8580 - 879-9565

TOPICAL INDEX

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

Cases

IN THE
SUPREME COURT OF THE UNITED STATES

October Term

No. ____

CARL ANTHONY WUCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT COURT

Petitioner, CARL ANTHONY WUCO, respectfully prays that a Writ of Certiorari issue, to review the judgement and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause on 21 May 1976.

Opinions Below

The Court of Appeals for the Ninth Circuit entered its opinion in this case on 21 May 1976. A copy of the Opinion, affirming the judgment of conviction, is attached as Appendix "A".

Subsequently, on July 1976, a timely petition for rehearing was denied. A copy of the Order appears as Exhibit "B" hereto.

Jurisdiction

As aforestated, the judgement of the United States Court of Appeals for the

Ninth Circuit (Appendix "A") was entered on 21 May 1976. On 5 June 1976, a timely petition for rehearing of the cause en banc was filed, and on 16 July 1976, said petition was denied (Exhibit "B"). The jurisdiction of this Court is involved under Titie 28 U.S.C. §1254(1) and §1651(a).

Question Presented For Review

We have before this Court a purely legal question, to which there is attached potential consequences of grave constitutional dimension, which may lead to a future divergence of appellate court decisions unless it is reviewed and resolved by this Court. Concisely framed, the question presented in light of the undisputed record is:

> Whether an accused can be convicted of possession and importation of a controlled substance, to wit, marijuana, where the Indictment did not charge him with possession and importation of that controlled substance, but rather with possession and importation of another specific controlled substance, to wit, Tetrahydrocannabinol (hereinafter T.H.C.).

Constitutional Provision Involved

The pertinent provisions of the Fifth Amendment to the United States Constitution is printed as Appendix "C" hereto.

Statement of the Case

On 16 October 1974, Petitioner and another were charged in a two-count Indictment with importation, and possession with intent to distribute, marijuana. This Indictment was returned in the Central District of California, and was denominated No. CR. 74-1513-RF. On 21 May 1975, the Government superseded said Indictment with the Indictment upon which this Petition is predicated, No. CR. 75-800-RF. The superceding Indictment is identical to its predecessor with the exception that the Controlled Substance was changed from marijuana to T.H.C.

The Government, completely consistent with its Indictment, continued to stress, during the trial, that Petitioner was being charged with T.H.C. and not marijuana.

On 2 September 1975, Petitioner waived his right to trial by jury.

On 4 September 1975, the matter was tried before The Honorable Robert Firth, United States Judge for the Central District of California. The trial lasted one day.

At the conclusion of the Government's case, Petitioner moved the trial court for judgement of acquittal pursuant to Rule 29. Said Motion was denied and

Petitioner was found guilty on both counts in the Indictment of importation and possession with intent to distribute marijuana.

On 3 November 1975, appellant was sentenced to the custody of the Attorney General for a period of two years as to each count, on condition that he serve ninety (90) days, execution of the balance being suspended; said sentences to run concurrently.

It was further ordered that Indictment No. CR. 74-1513 RF be dismissed.

On 12 November 1975, Petitioner filed a timely Notice of Appeal. The conviction of Petitioner was affirmed on appeal. On 16 July 1975, Petitioner's petition for rehearing was denied.

REASON FOR GRANTING THE WRIT

Petitioner respectfully urges that the uncontroverted factual matrix of the instant case falls within the judicial parameters of this Court's decision in Ex Parte Bain (1887) 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849.

The single fact which supports the basis for this Court in granting the instant petition for a Writ of Certiorari is that Petitioner stands wrongfully convicted of possession and importation of a controlled substance, to wit, marijuana, where the Indictment did not charge him with possession and importation of that controlled substance, but rather with possession and importation of another specific controlled substance, T.H.C. It must be noted that T.H.C. and marijuana are two specific and distinct drugs; in fact, these two substances are clearly treated as separate by the Drug Enforcement Administration.

The three judge panel of this Honorable Court, while expressly stating that it could not "understand or approve the course followed in the Government's presentation". (App. p.2), nevertheless found no substantial harm to petitioner and affirmed his conviction.

It is respectfully submitted that the appellate decision rendered herein fails to comport with long-established constitutional principles and, indeed vitiates the ratio descendi of the Supreme Court Decision in Ex Parte Bain (1887) 121 U.S. 1, 10, 7 S.Ct. 781, 786, 30 L. Ed. 849. That decision, of course, emphasized that an indictment may not be amended; the reasoning for such a rule, that indictments are actions of Grand Juries and charges alleged therein may never be altered by a prosecutor or even the Court, has seemingly been ignored in the instant cause:

> "The party can only be tried upon the Indictment as found by such Grand Jury, and especially upon all its language found in the charging part of that Instrument. . . how can it be said that, (with these words stricken out) it is the Indictment which was found by the Grand Jury? If it lies within the

province of a court to change the charging part of the Indictment to suit its own notions of what ought to have been, or what the Grand Jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an Indictment by a Grand Jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer', may be frittered away until its value is almost destroyed. . . we are of the opinion that an Indictment found by a Grand Jury was indispensable to the power of the Court to try the Petitioner for the crime with which he was charged."

Petitioner herein was originally charged and indicted with offenses relative to marijuana, on 16 October 1974. Thereafter, the Government obtained a new Indictment charging the identical offenses involving T.H.C., rather than marijuana. The conviction, which was affirmed, was based on marijuana offenses.

It is submitted that it is incongruous to pay homage to the rule that the specificity of an Indictment formulates the only triable issues [United States v. Gray (9th Cir. 1971) 448 F. 2d 164] and the only basis for a conviction thereon, and at the same time assert that a conviction of an unindicted offense fails to cause the individual "substantial harm". Petitioner respectfully urges that the Opinion in Bain dictates that the error, in and of itself, was prejudicial:

"It only remains to consider whether this change in the Indictment deprived the Court of the power of proceeding to try the Petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the Indictment on which he was tried was no Indictment of a Grand Jury. The decisions which we have already referred to, as well as sound principle, require us to hold that after the Indictment was changed it was no longer the Indictment of the Grand Jury who presented it. Any other doctrine would place the rights of the citizen, which were contended to be protected by the constitutional provision, at the mercy or control of the Court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the Court in the body of the Indictment as presented by the Grand Jury, and the prisoner charged be called upon to answer the Indictment as thus charged, the restriction which the Constitution places upon the power of the Court, in regard to the pre-requisite of an Indictment, in reality no longer exists. It is of no avail, under such circumstances, to say that the Court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by Indictment, the jurisdiction of the offense is gone, and the Court has no right to proceed any further in the progress of the case for want of an Indictment. If there is nothing before the Court which the prisoner, in the language of the Constitution, can be 'held to answer', he is then entitled to be discharged so far as the offense originally presented to the Court by the Indictment is concerned. The power of the Court to proceed is as much arrested as if the Indictment had been dismissed or a noble prosequi had been entered. There was nothing before the Court on which it could hear evidence or pronounce sentence. . ." (121 U.S. at 13-14, 7 S.Ct., at 789, 30 L.Ed., at 853).

Even if the error cannot be viewed as inherently prejudicial, Petitioner urges that it is manifest that the error constituted substantial prejudice to him. The Court's conduct in ignoring the substance of the Indictment and, in essence, amending the Indictment by consenting to the Government's variance in proof in changing the most essential ingredient of the Indictment, to wit, the designation of the specific controlled sustance possessed and imported by Petitioner totally deprived him of basic constitutional rights. The right to Indictment by Grand Jury was certainly violated. Furthermore, appellant's justifiable reliance on the charges of the superceding indictment, caused him to abandon his right to trail by jury and to cross-examine and confront witnesses.

CONCLUSION

Petitioner prays to this Court's sense of fairness, grounded in the fundamental precepts of due process and enlightened judicial discretion, and respectfully requests that the petition for a Writ of Certiorari be granted.

Respectfully submitted.

LAW OFFICES OF PAUL CARUSO

PAUL CARUSO

Counsel for Petitioner

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* CARL ANTHONY WUCO, *Defendant-Appellant.*	No. 75-3603
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* TIMOTHY W. SANT AGATA, *Defendant-Appellant.*	No. 75-3543 OPINION

[May 21, 1976]

Appeal from the United States District Court
for the Central District of California

Before: SMITH* and GOODWIN, Circuit Judges,
and WILLIAMS,** District Judge.

SMITH, Circuit Judge:

Sant Agata and Wuco, convicted on trial to the court, jury waived, in the United States District Court for the Central District of California, Robert Firth, *Judge*, of importation and possession with intent to distribute of "approximately 1,010 pounds of marijuana, a substance containing approximately 10 pounds of tetrahydrocannabinol (delta-9-THC), a schedule I controlled substance," appeal on grounds relating to the government's course in drafting the charges and managing the proof at trial. While we cannot understand or approve the course followed in the government's presentation, we find no substantial harm to defendents and affirm the convictions.

*The Honorable J. Joseph Smith, Senior United States Circuit Judge for the Second Circuit, sitting by designation

**The Honorable Spencer M. Williams, United States District Judge for the Northern District of California, sitting by designation.

Defendants were caught red-handed with an aircraft which contained the marijuana shortly after it landed from a trip to Mexico. When charged in an indictment with violation of the statute as it applied to marijuana they indicated that a so-called "species defense" would be raised, a defense contending that more than one species of marijuana is recognized, that the statute is confined to the species described as "cannabis sativa L." and that the substance seized was another variety of cannabis.

To avoid this issue a superseding indictment was obtained, the indictment on which conviction was had. The draftsman assumed that the THC found in the hemp plant was the same substance as that contained in schedule I of controlled substances under 21 U.S.C. §812(c) Schedule I(c). It is now conceded that in fact the substance there described is synthetic THC.

Defendants contend that their conviction must be set aside since there is no proof that the substance they possessed contained synthetic THC, and that the reference to marijuana in the indictment cannot support their conviction since the government on trial disclaimed reliance on it and relied only on the presence of THC. This they contend seriously prejudiced the defense, since it led them to abandon the "species defense" and waive the jury.

The claimed prejudice, however, is not apparent. The "species defense" is a matter of statutory interpretation, for the court, not the jury, and is not available to appellants. Subsequent to the trial in this case the "species defense" was rejected by this court as it has been by all other circuits which have ruled upon it. See *United States v. Kelly*, ... F.2d ..... (9th Cir., Jan. 12, 1976), and cases cited.

Appellants' apparent contention is that marijuana and THC are mutually exclusive, that THC can be only the Schedule I, synthetic variety and that the government having chosen to pursue them only on this theory, the convictions may not stand. It is quite plain, however, that the government charged, sought to prove, and did prove that the substance imported was the organic THC contained in the 1,010 pounds of marijuana. While this was not the synthetic THC defined as a Schedule I controlled substance the government assumed it was, it would appear to be a substance denounced by 21 U.S.C. §802(15) as a "part" or "derivative" of the plant cannabis sativa L. as the terms were used by the Congress. The indictment is "a plain, concise and definite written statement of the essential facts constituting the offense charged." Rule 7(c), Fed. R. Crim. P.1.

1It is the statement of facts in the pleading, rather than the statutory citation, that is controlling, and if an indictment or information properly charges an offense under the laws of the United States it is sufficient, even though the United States Attorney or the Grand Jury may have supposed that the offenses charged were covered by a different statute.
1 C. Wright, *Federal Rules of Criminal Procedure* (1969) 228.

The interpretation of the statute was for the court, not for the jury and as it turns out could have been of no comfort to appellants here. We fail to find any prejudice accruing to appellants through the government's mistaken statutory reference. The conduct as alleged and proved constituted a violation of federal criminal law and its claimed technical misdescription does not invalidate the convictions.

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* CARL ANTHONY WUCO, *Defendant-Appellant.*	)	No. 75-3603
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* TIMOTHY W. SANT AGATA, *Defendant-Appellant.*	)	No. 75-3543 ORDER

Appeal from the United States District Court
for the Central District of California

Before: SMITH* and GOODWIN, Circuit Judges,
and WILLIAMS,** District Judge.

The members of the panel in the above-numbered cases have voted unanimously to deny the petitions for rehearing. Judge Goodwin has voted to reject the suggestion for rehearing en banc, and Judges Smith and Williams recommended that it be rejected.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestion for rehearing en banc is rejected.

---

*The Honorable J. Joseph Smith, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

**The Honorable Spencer M. Williams, United States District Judge for the Northern District of California, sitting by designation.

APPENDIX C.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or Indictment of a Grand Jury..... nor be deprived of life, liberty or property, without due process of law..."

No. 76-314

In the Supreme Court of the United States

OCTOBER TERM, 1976

CARL ANTHONY WUCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-314

CARL ANTHONY WUCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that he has been convicted of an offense not charged in the indictment.

After a jury-waived trial in the United States District Court for the Central District of California, petitioner and a co-defendant were convicted of importing, and of possessing with intent to distribute, a controlled substance, in violation of 21 U.S.C. 841(a), 960(a)(1), and 952(a). Petitioner was sentenced to concurrent two-year terms of imprisonment (the first 90 days to be served in a jail-type institution and the balance suspended) and probation for three years (R. 53a). The court of appeals affirmed in an opinion upon which we chiefly rely (Pet. App. A).

As the court of appeals observed (Pet. App. 2), petitioner and his co-defendant "were caught red-handed with an

aircraft which contained [approximately 1,000 pounds of] marijuana shortly after it landed from a trip to Mexico." The first indictment returned against petitioner charged him with importation and possession of "marijuana," a Schedule I controlled substance (see 21 U.S.C. 812(c)(c)(10)). Petitioner indicated that he would assert that the marijuana in question was a different species from the marijuana covered by the statute, which is defined as "the plant Cannabis sativa L." (see 21 U.S.C. 802(15)). The government thereupon returned a superseding indictment charging importation and possession of "Tetrahydrocannabinols" ("THC"), also a Schedule I controlled substance (see 21 U.S.C. 812(c)(c)(17)). Although THC in its organic form is a natural constituent of marijuana (Tr. 278-313), the THC identified in Section 812(c)(c)(17) is actually the synthetic form of the substance (see 39 Fed. Reg. 22141-22142). Petitioner claims that there was no proof that he possessed synthetic THC, and that therefore his conviction should be reversed.

The court of appeals correctly disposed of this contention as follows (Pet. App. A2):

> [T]he government charged, sought to prove, and did prove that the substance imported was the organic THC contained in the 1,010 pounds of marijuana. While this was not the synthetic THC defined as a Schedule I controlled substance the government assumed it was, it would appear to be a substance denounced by 21 U.S.C. §802(15) as a "part" or "derivative" of the plant cannabis sativa L. as the terms were used by Congress.

In short, the indictment fully apprised petitioner of the charges against him and accurately described the crimes for which he has been convicted. The objections petitioner raises afford no basis for overturning his conviction.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.